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MEMORANDUM OF LAW

DATE: March 24, 2017

TO: Honorable Members of the City Council

FROM: City Attorney

SUBJECT: Brown Act Rule Regarding Public Comment at City Council on Items Previously Considered at Council Committee

INTRODUCTION

Councilmember Kersey has asked this Office for a memorandum on the applicability and scope of California Government Code (Government Code) section 54954.3,¹ specifically, the clause that provides that public comment is not required at City Council (Council) on an item that was heard at Council Committee and on which the public was afforded the opportunity to comment during the Council Committee meeting, so long as the item has not been substantially changed since the Council Committee meeting.

QUESTIONS PRESENTED

1. Does the Brown Act mandate public comment at Council on an item that was already heard at Council Committee?
 - A. What is the scope of the Section 54954.3 provision limiting public comment on items previously heard at Council Committee?
 - B. What is the meaning of “substantially changed”?
2. Does Section 54954.3 apply only to consent items?

¹ Government Code section 54954.3 is a provision of the Ralph M. Brown Act (Brown Act), Government Code sections 54950-54963, providing for meetings of legislative bodies to be noticed and open to the public, including public participation. All future references are to the California Government Code unless otherwise stated.

SHORT ANSWERS

1. No. Section 54954.3 does not require that the Council take public comment on an agenda item at a *regular* meeting of the Council if specific requirements are met.
 - A. This exception to the general rule mandating public comment is provided with respect to regular meetings only.
 - B. Section 54954.3 leaves the determination of what is “substantially changed” to the legislative body. Although the phrase “substantially changed” is not specifically defined in the Brown Act, it is reasonable to conclude based on the legal definition of “substantial” that an “essential” or “material” change would be deemed a substantial change requiring public comment.
2. No. The Brown Act does not distinguish between discussion and consent items listed on an agenda. In either case, Section 54954.3 requires that the public be afforded an opportunity to speak to an item at some point, whether that is at a Council Committee meeting or a subsequent Council meeting or both.

ANALYSIS

I. DOES THE BROWN ACT MANDATE PUBLIC COMMENT AT A COUNCIL MEETING ON AN ITEM THAT WAS ALREADY HEARD AT A COMMITTEE?

Section 54954.3, subdivision (a) establishes the framework for public comment on an agenda item. Although this section requires that “[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public . . . ,” it also carves out an exception to the public comment requirement. Public comment is not required on an agenda item at a regular meeting of the legislative body when all the following are met:

1. The item was considered by a committee composed exclusively of members of the legislative body at a public (open) meeting;
2. All interested members of the public² were afforded the opportunity³ to address the committee on the item, before or during the committee’s consideration of the item; and

² The Brown Act does not otherwise define “interested members of the public.” However, the City’s practice allows any person who submits a speaker slip to speak to an item on the agenda.

³ The Brown Act provides discretion to the legislative body to adopt reasonable regulations for public comment, including regulations that limit time per speaker or per subject. Cal. Gov’t Code § 54954.3(a); *See also* City Att’y MOL No. 2014-16 (Dec. 2, 2014), discussing the exercise of this discretion on non-agenda public comment.

3. The item has not substantially changed since the committee heard the item, as determined by the Council.

Cal. Gov't Code § 54954.3; 1994 City Att'y MOL 858 (94-95; Dec. 12, 1994).

A. Scope of Section 54954.3

The Section 54954.3 exception applies only to regular Council meetings, not special meetings. 1994 City Att'y MOL 858 (94-95; Dec. 12, 1994)⁴; *Galibso v. Orsosi Pub. Utility District*, 167 Cal. App. 4th 1063, 1079-80 (2008); *Chaffee v. San Francisco Library Commission*, 115 Cal. App. 4th 461, 468-69 (2004); 78 Op. Cal Att'y Gen. 224 (1995).

If each of the requirements is met and the item is scheduled on a regular Council agenda, the Brown Act does not require that public comment be taken on the agenda item. The first requirement would be met if the body were any of the Council standing committees⁵ provided for under the Rules of Council. SDMC § 22.0101. The second requirement is discussed further in Section II of this memorandum.

B. Determination of Substantially Changed

Ultimately, Section 54954.3 leaves it up to the discretion of the legislative body to determine what constitutes “substantially changed.”

There are no court cases providing further guidance on the interpretation of the phrase as used in Section 54954.3. However, Courts have held “substantial compliance” for notice purposes under the Brown Act, to mean “actual compliance *in respect to the substance essential to every reasonable objective of the statute.*” *Castaic Lake Water Agency v. Newhall Co. Water District*, 238 Cal. App. 4th 1196, 1205, 1207 (2015) (citation omitted), as modified (Jul. 22, 2015), 238 Cal. App. 4th 1196 (emphasis added).

⁴ This memorandum advised that this exception does not apply to non-agenda public comment at Council where the same comment was made at a committee meeting; the Council cannot restrict non agenda public comment at Council even if the same comment was made at an earlier Council Committee meeting.

⁵ The Audit Committee does not meet the standard in Section 54954.3, because it is not made up exclusively of members of the legislative body (the Council). The exception does not apply to this committee.

Black's Law Dictionary defines “substantial” as:

1. Of, relating to, or involving substance; *material* <substantial change in circumstances>.
2. Real and not imaginary; having actual, not fictitious, existence <a substantial case on the merits>.
3. *Important, essential, and material*; of real worth and importance <a substantial right> ...
6. Considerable in amount or value; *large in volume or number* <substantial support and care>. . . .

Black's Law Dictionary 1656 (10th ed. 2014) (emphasis added).

Absent specific guidance from the courts, the Council should consider the purpose for which the law was adopted, namely to ensure the public’s right to attend meetings and to facilitate public participation in local government decision making. *Service Employees Inter. Union, Local 99 v. Options--A Child Care and Human Services Agency*, 200 Cal. App. 4th 869 (2011).

II. DOES SECTION 54954.3 APPLY ONLY TO CONSENT ITEMS?

The Brown Act does not distinguish between “consent” and “discussion” items in its public comment provisions. The requirement is simply that “all interested members of the public were afforded an opportunity to address the committee on the item.” Matters are generally placed on consent for purposes of meeting organization and to allow the legislative body to take action in a summary fashion, that is, approving multiple items in a single vote or signaling no need for a staff report. *Robert's Rules of Order Newly Revised*, (11th ed. 2011), p. 361. Under the Brown Act, and in accordance with the Rules of Council, public comment is permitted on an agenda item when first discussed, regardless of whether the item is identified as “consent,” “discussion,” “information,” or otherwise. Therefore, regardless of how the item is characterized when first docketed on a committee agenda, public comment must be permitted.

Likewise, the characterization of an item on the Council agenda as “consent” or “discussion” does not preclude application of the public comment exception for items heard at committee provided by Section 54954.3. The rule is simply that where public comment has been allowed on an item at committee and the item before the Council is not substantially changed, public comment is not required.

If the Council desires to make use of this Brown Act provision, whether such items are characterized on the subsequent Council agenda as “consent” or “discussion,” we recommend the Council agenda identify those items meeting the requirements of Section 54954.3 and on which public comment will not be taken. We would further recommend amending the Rules of Council to address the issue, including clarifying for the public the Council’s standards for “substantial change.”

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CONCLUSION

The Council may decide to limit public comment on an agenda item at Council that was previously heard at a standing committee of the Council if the requirements of Government Code section 54954.3 are met. Any material change or several changes to an item after Committee would constitute a “substantial change” requiring public comment at the subsequent Council meeting. If Council chooses to take this path, this Office recommends amending the Rules of Council to provide clearer guidance to the Council, staff, and the public.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Prescilla Dugard
Prescilla Dugard
Chief Deputy City Attorney

LD1:PDM:ccm

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cc: Honorable Mayor Kevin Faulconer

Elizabeth Maland, City Clerk

Andrea Tevlin, Independent Budget Analyst